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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-1237

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,

Respondents-Appellants
Cross-Appellees,

VERSUS

LARRY JONES,

Petitioner-Appellee
Cross-Appellant

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Larry Jones, who is now held in the Mississippi State Correctional Institute at Parchman, Mississippi, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The District Court gave Larry Jones permission to proceed in forma pauperis March 9, 1981, and appointed counsel under the Criminal Justice Act of 1964 by order dated February 9, 1982.

DATED: This, the 17th day of May, 1985.

T.H. FREELAND, III

ATTORNEY FOR LARRY JONES

OF COUNSEL:

FREELAND AND FREELAND
1013 Jackson Avenue
Post Office Box 269
Oxford, Mississippi 38655

CERTIFICATE OF SERVICE

I, T.H. FREELAND, III, counsel of record for respondent, certify that I have this day caused to be mailed via the United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing Motion for Leave to Proceed In Forma Pauperis to the following:

William S. Boyd, III, Esquire
White & Morse
Suite 1209 - One Hancock Plaza
Gulfport, Mississippi 39502

This, the 17th day of May, 1985.

T.H. FREELAND, III

NO. 84-1237

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
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VERSUS

LARRY JONES,
Petitioner-Appellee
Cross-Appellant

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals misconstrue this court's ruling in Enmund by barring the death penalty in absence of proof the respondent killed, attempted to kill, or intended to kill?

2. Did the court of appeals err in applying Enmund retroactively?

3. Did the court of appeals err in failing to find claims of ineffective assistance of counsel and failure to give a lesser included offense instruction were procedurally barred?

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STATEMENT OF THE CASE

The statement of facts in the petition for certiorari at 4-8 accurately states the facts in this case.

SUMMARY OF THE ARGUMENT

This is not a suitable case for certiorari. The primary issue presented--whether the lower court correctly found insufficient evidence that Larry Jones killed, intended to kill, or attempted to kill--involves nothing more than an examination of the facts in this individual record. It can therefore have no significance beyond the immediate parties. Furthermore, an examination of the record will show that the lower court was correct.

The second issue presented--whether Enmund should be retroactively applied--was referred to as "patently frivolous" in the circuit court of appeals. The question as briefed by the petitioner is whether the petitioner should get another opportunity to prove individual culpability against Larry Jones because the petitioner was somehow "surprised" by this court's decision in Enmund v. Florida, 458 U.S. 782 (1981). There is no conflict of the circuits on this issue, and the question is limited essentially to this particular case. Furthermore, as the petitioner has argued successfully in other cases, Enmund was predictable and therefore could not have been a "surprise" to the petitioner.

The third issue presented, involving procedural bar, is not urged as a genuine issue. The petitioner admits to have raised it for preservation purposes only.

INTRODUCTION

Larry Jones was convicted of capital murder and sentenced to death in December of 1977. At the trial, the state proved that Jones and another individual had been involved in the robbery of a dry goods store. During the robbery, the proprietor of the store was killed. There was neither proof of which of the two killed the proprietor, nor proof of any plan or joint project to kill the proprietor. The state thus failed altogether to prove that Larry Jones killed, intended to kill, or attempted to kill. For that reason, the Fifth Circuit held that a death sentence was barred under Enmund v. Florida, 458 U.S. 782 (1981). Jones v. Thigpen, 741 F.2d 805, 812-13 (5th Cir. 1984).

This case involves a complete absence of proof of individual culpability. It thus does not present the issue on which this Court recently granted certiorari in Cabana v. Bullock, 53 L.W. 3757 (U.S. April 22, 1985) (No. 84-1236). In Bullock, there was sufficient evidence to raise a jury question regarding individual culpability, but the issue had not been submitted to the jury through instructions because Bullock was tried before Enmund was decided. The Fifth Circuit in both Bullock and Reddix v. Thigpen, 728 F.2d 705, 710-11 (5th Cir. 1984), has held that Enmund must be submitted to the jury through proper instructions in jury question cases.[1] The Eleventh Circuit apparently

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[1] A jury finding of individual culpability is now required by statute in Mississippi. The current death penalty statute requires the jury to make a written finding the defendant either "actually killed," "attempted to kill," "intended tht a killing take place," or "contemplated lethal force would be employed." Miss. Code Ann. § 99-19-101(7) (Supp. 1983).

disagrees, thus creating a conflict of the circuits for Bullock.

This conflict is irrelevant to Larry Jones' case. As the Fifth Circuit recognized, there was no evidence that Larry Jones killed, attempted to kill, or intended to kill. Jones', 741 F.2d at 812-13. No matter how this Court resolves the jury question issue presented in Bullock, Larry Jones case is unaffected. For that reason, the granting of certiorari in Bullock has no bearing on the question of whether to grant certiorari in this case.

REASONS FOR REFUSING TO GRANT THE WRIT

A. First question presented:

The writ should be granted to determine whether the United States Court of Appeals for the Fifth Circuit has misconstrued this Court's ruling in Enmund

Response

There is neither a substantial federal question involved, nor a conflict of the circuits raised by the Fifth Circuit holding that the death penalty cannot be imposed in absence of evidence that Larry Jones killed, intended to kill, or attempted to kill.

The central holding of the Fifth Circuit was that there was no evidence in the state court trial to support a finding that Larry Jones killed, intended to kill, or attempted to kill. Jones, 741 F.2d at 812-13. This holding concerns only the facts found in this individual record. The two legal propositions essential to the Fifth Circuit's holding--(1) that a state must prove a defendant to have killed, attempted to kill, or intended to kill to support a death sentence; and (2) that the double jeopardy clause bars a re-trial where there was insufficient evidence in a prior trial--have already been clearly and thoroughly expounded upon by the Court, in Enmund v. Florida, 458 U.S. 782, 801 (1981) and Burks v. United States, 437 U.S. 1, 18 (1978),

respectively. There are no decisions in the circuit or state courts that conflict with the Fifth Circuit's application of Enmund and Burks in Larry's case. Furthermore, the Attorney General concedes the correctness of the Fifth Circuit's construction of these cases. Attorney General's Petition at 42-43, 55-56.

The Attorney General attempts to create a legal issue by suggesting that the Fifth Circuit decided that Enmund prohibits the death penalty where one has been found to be "aiding and abetting in the homicide." Attorney General Petition at 24. This misstates the Fifth Circuit's holding; the Fifth Circuit found the death penalty could not be imposed in the absence of proof that Larry Jones aided or abetted in a homicide. This finding was based upon a record which, at most, might establish that Larry Jones aided and abetted in a robbery:

> ...Jones himself has not been shown to have killed or intended to kill. His presence at the scene supports no such inference.

Jones v. Thigpen, 741 F.2d 805, 812 n.8 (5th Cir. 1984).

The Fifth Circuit's conclusion that there was no evidence of individual culpability in the homicide is based on the court's examination of the facts in the state trial record. The circumstantial evidence adduced at trial would support an inference that Larry was in the store where the homicide occurred, as inferred from his being observed in the vicinity of the store with goods from the store. The record would further support an inference that Larry was present in the store when the killing took place, as inferred from minute spots of un-typable human blood found on boots he wore. But that is all the record will support, even allowing the Attorney General all favorable

facts and inferences. This the Mississippi Supreme Court held was sufficient under the felony-murder rule in force at that time to justify imposition of the death penalty. Jones v. State, 381 So. 2d 983, 996 (Miss. 1980) (stating there "is strong evidence that he was at least present when the fatal beating took place. The doubt concerning Jones' precise role in the homicide does not upset the jury's sentence of death under these circumstances.").

The Fifth Circuit concluded that this evidence could only support a finding of culpability for the robbery, and not the homicide. The Attorney General has continually attempted to gloss over this conclusion by treating as interchangeable the issues of Larry's culpability for the robbery and his culpability for homicide. Compare Attorney General's Petition at 5-8 (accurate statement of fact showing no culpability for the homicide) with Attorney General's Petition at 24, 27, 28-29, 37, 40 (erroneously stating Larry was culpable for the homicide).

Examination of a trial record and review of the Fifth Circuit's conclusion as to facts is precisely the sort of project with which this Court does not occupy its time. Even if this Court did undertake such a mundane task, it would find that the lower court's factual findings are thoroughly correct and in accordance with the principles of In re Winship, 397 U.S. 358 (1970) and Jackson v. Virginia, 443 U.S. 307 (1979). The Attorney General's "first question presented" requires first that this Court review the trial record and find--contrary to the record and contrary to the Fifth Circuit's holding--that Larry aided and abetted the homicide. Since Larry aided and abetted only in the robbery and not in the homicide, the "first question

presented"--that of whether Enmund allows execution of one who aids and abets a homicide--is inapposite to this case. The petition for writ of certiorari on this question should be denied.

B(1) Second Question Presented:

Alternatively, the writ should be granted to determine whether under the circumstances the Court of Appeals erred in concluding that Enmund should be applied retroactively.

Response:

The question of whether Enmund should apply retroactively poses no substantial federal question, involves no conflict in the circuit courts of appeals, and is admittedly frivolous on its merits.

B(2) The question actually briefed by Petitioner:

Alternatively, the writ should be granted to determine whether under the circumstances the court of appeals erred in concluding that Burks should be applied.

Response:

The question of whether Burks should be applied is limited essentially to this particular case and poses no substantial federal question nor involves a conflict in the circuit courts of appeals.

(1)

A decision establishing that certain punishment is cruel and unusual involves just the sort of fundamental guarantee that is not susceptible to solely prospective application. This is conditionally conceded by the Attorney General at page 55 of the Petition: "...we do not, in this alternate proposition, contest the retroactive application of Enmund." Attorney General's Petition at 55. The Attorney General then proceeds to suggest that because the Attorney General relied on the pre-Enmund common law rule, it would be unfair to retroactively apply the constitutional principle expressed in Enmund. The Fifth Circuit expressly

recognized "the patent frivolousness of such an argument." Jones, 741 F.2d at 811.

An unconditional concession that the rule is retroactive would have been more appropriate, as there appears to be a unanimity among the circuit courts of appeals which have faced Enmund questions. See, e.g., Hitchock v. Wainwright, 745 F.2d 1332, 1340 (11th Cir. 1984) (applying Enmund retroactively) (a 1976 killing); Jones v. Thigpen, 741 F.2d 805, 810-12 (5th Cir. 1984) (expressly declaring Enmund to be retroactively applied) (a 1974 killing); Chaney v. Brown, 730 F.2d 1334, 1350 (10th Cir. 1984) (applying Enmund retoractively) (a 1977 killing); Hutchins v. Garrison, 724 F.2d 1425, 1435 n.14 (4th Cir. 1983) (same) (a 1979 killing); Gentry v. MacDougall, 685 F.2d 322, 323 (9th Cir. 1982) (same) (a 1977 killing).

In view of the foregoing, this question poses neither a substantial federal question nor involves a conflict among circuit courts of appeal. The petition for writ of certiorari on this issue should thus be denied.

(2)

The Attorney General's discussion of its second question presented is almost entirely a discussion of the merits--whether it was "surprised" by Enmund and should get a third opportunity to offer Enmund proof. In facing this issue, the Attorney General concedes the correctness, as a general principle, of the Fifth Circuit's conjunction of the Enmund requirement of individual culpability and the Burks requirement of sufficient evidence before a retrial can be had. Attorney General's Petition at 44, 56. The Attorney General complains only that, because Larry's is an older case, tried in December of 1977, the State should have another opportunity to prove "intent to kill," unhampered by

double jeopardy bars because it was surprised by the Enmund requirement. Attorney General's Petition at 56-57.

The Attorney General fails to mention or argue "conflict in the circuits" or "substantial federal question" because this case is sui generis and presents no question of any importance that reaches beyond this individual case. The Fifth Circuit recognized this:

> We know of no other case in which an Enmund claim has succeeded on grounds of insufficient evidence, and we are led to believe that most of the few death sentences based on felony murder convictions are supported by Enmund evidence sufficient under the Jackson standard. The double jeopardy bar will be infrequent indeed.

741 F.2d at 812.

Basically, the Attorney General is asking this Court to formulate a way around the double jeopardy clause for this case alone. The Attorney General concedes that any such circumventing of the double jeopardy clause will be based on the specific facts relating to the alleged unanticipated nature of the Enmund decision. Attorney General Petition at 44-46. The focus on specific facts, necessary to evaluate this "surprise" issue, precludes the possibility of a clear, broad principle of law being generated.

Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), which the Attorney General seems to argue conflicts with the Fifth Circuit's Jones opinion does not involve the same question at all. Linam merely holds that where a rule is "merely a formal matter, not a substantive one [,]...there is no problem of whether to produce evidence." Linam, 685 at 373-74. Linam involved the procedure for proving the other crimes for a habitual offender conviction, not a

substantive element of proof the state had to prove to make its case. Linam, 685 F.2d at 371. No conflict exists among the circuit courts of appeal on the double jeopardy issue announced in Larry's case.

In avoiding discussion of conflicts in the circuits or presence of a substantial federal question, the Attorney General focuses instead on the merits of its argument that it was surprised by Enmund. Yet the Enmund requirement of individual culpability was foreseeable at the time of the trial. Even Larry Jones' then lawyer--since held ineffective by the District Court[2]--foresaw Enmund at trial and preserved it as have all of Larry Jones' subsequent lawyers. Enmund was, quite simply, no surprise at the time it was handed down. The Enmund rule had been clearly foreshadowed in cases before Coker, such as Roberts v. Louisiana, 428 U.S. 325, 353 (1976) ("...capital punishment is acceptable to the contemporary community as just punishment for at least some intentional killings" [emphasis added]), and the rule had been raised and preserved as an issue well-prior to Larry's 1977 trial, as evident in Richmond v. Cardwell, 450 F. Supp. 519, 524 (D. Ariz. 1978) (a 1973 killing where the Enmund issue had been raised and preserved, and was directly addressed by the court). Furthermore, as several courts have recognized, Enmund was insufficiently novel for its "newness" to count as "cause" under the cause-and-prejudice test of Engle v. Isaac, 456 U.S. 107 (1982). See, e.g., King v. Strickland, 714 F.2d 1481, 1491-92 (11th Cir. 1983) (newness of Enmund

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[2] Jones v. Thigpen, 555 F. Supp. 980, 879-80 (S.D. Miss. 1983). Jones' then attorney has since been disbarred. The District Attorney who tried the case is presently under federal indictment for racketeering.

insufficient to constitute "cause"); Griffin v. Wainright, 588 F. Supp. 1549, 1564 (M.D. Fla. 1984) (same); Evans v. State, 441 So. 2d 520, 523 (Miss. 1983) (same); Smith v. State, 434 So. 2d 212, 217 (Miss. 1983) ("tools" not lacking to form Enmund claim).

The Attorney General in other cases--Evans and Smith in particular--has persuasively argued that Enmund was so foreseeable for defense counsel that any novelty in its holding could not constitute "cause" to excuse procedural default. In the case at bar, the Attorney General claims that it did not foresee the Enmund rule. Any rule defense counsel should have foreseen would be equally predictable to prosecuting attorneys. There is no substance to the Attorney General's argument that it was "surprised" by Enmund.

C. Third Question Presented:

The Court should granted [sic] the writ to determine whether the Court of Appeals erred in failing to find that respondent's claims of ineffective assistance of counsel and failure to give a lesser included offense (instruction?) were procedurally barred.

RESPONSE:

(1) The question of whether a Mississippi Supreme Court's no-opinion order is predicated on procedural bar poses no substantial federal question, involves no conflcit in the circuit courts of appeal, and is admittedly raised only for preservation purposes.

(2) The merits of Larry's ineffective-assistance-of-counsel claim and his lesser-included-offense claim underscore the fact that Larry is entitled to vacation of both his death sentence and his conviction regardless of how the first two "questions presented" are decided.

(1)

The Attorney General explicitly declines to urge this question as a viable one before this Court, but rather has raised it only for preservation purposes. Attorney General's Petition at i, 58-59. If actually urged, this question would once again invite this Court to make a finding of fact contrary to the lower courts, regarding whether or not the Mississippi Supreme Court invokes state procedural bars through a no-opinion order denying access to collateral relief in state court to Larry. This raises no substantial federal question nor does it involve a conflict among the circuit courts of appeal.

CONCLUSION

This case is of no importance beyond the immediate parties. This case involves neither a substantial federal question nor a conflict among the circuit courts of appeals. Furthermore, the Attorney General's arguments on the merits raised in his petition are without merit.

Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX

STATUTORY MATERIALS

Miss. Code Ann. § 99-19-101 (as amended 1983)

§ 99-19-101 Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and circumstances to be considered.

§ (7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

CERTIFICATE OF SERVICE

I, T.H. FREELAND, III, counsel of record for respondent, certify that I have this day caused to be mailed via the United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to the following:

William S. Boyd, III, Esquire
White & Morse
Suite 1209 - One Hancock Plaza
Gulfport, Mississippi 39502

This, the 17th day of May, 1985.

T.H. FREELAND, III